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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

NORTON MARSHALL, Appellant,
vs.
PETER T. BURTIS, Appellee.
} Appeal from the Supreme Court of the Territory of Arizona.

BRIEF OF APPELLANT.

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This was an action brought by Burtis against Marshall, December 18, 1894, to quiet the title in plaintiff in the lot of land named, Burtis being in possession, his grantor being Friday Mary Neahr, who executed a deed to him on October 14, 1892, for a consideration of $1,500.

Miss Neahr derived title by deed from her father, David Neahr, on May 9, 1882, which deed contained the "condition" that the land was not to be sold or disposed of until the grantee should reach the age of 21 years.

On October 24, 1894, Friday M. Neahr executed and delivered to Norton Marshall, appellant, a deed for the same lot, in which deed she "avoids, revokes, and disaffirms" the former deed to Burtis, because it was executed and delivered by her during infancy, and she being at the time of this latter deed to Marshall, of full age. (Transcript, p. 59.)

A cross-complaint was filed by Marshall, setting up title in himself under this last deed and infancy of Neahr at date of Burtis' deed; proper issues were made up, evidence taken, trial had in the District Court without a jury, resulting in a judgment for Burtis. (Trans., p. 8.)

An appeal was prosecuted by Marshall to the Supreme Court of the Territory, where, on January 30, 1897, judgment was rendered, affirming the judgment of the court below (Trans., p. 71), and an appeal was taken to this Court.

The judgments in both instances in the courts below were general for the plaintiff below.

It may also be stated here, as a point about which there is no controversy, as is believed, that Neahr spent all the consideration she received from Burtis for her deed to him within six months

after she obtained it, and had none left when she deeded to Marshall. (Trans., p. 49.)

The errors assigned reach every possible phase of the case, and need not be specifically referred to here.

The judgment appealed from, being general, requires an analysis of the case.

The only possible questions may be said to be—

1. That Neahr was of full age when she made the deed to Burtis, October 14, 1892.

2. If not, that she failed to disaffirm within a reasonable time after attaining her majority.

3. That she ratified her deed to Burtis before deeding to Marshall and after attaining majority.

4. That she was estopped to disaffirm, by her own act, in averring her majority in executing the Burtis' deed.

5. That she was bound to restore the consideration to Burtis before an effective disaffirmance.

6. That Marshall, knowing the prior deed to Burtis, could not take title to himself in October, 1894.

The first three propositions present purely questions of fact, and upon this record it is impossible that the court below could have based its judgment upon an affirmance of either of the three.

The last three propositions present solely questions of law, and these it is confidently submitted are only to be resolved in favor of appellant.

Appellant asserts that Neahr was not born until September, 1873; her deed to him was in October, 1894.

Appellee's contention is that she was born in September, 1871; her deed to him was in October, 1892.

1st. Was Friday M. Neahr of full age when she conveyed to the plaintiff, Burtis, in October, 1892?

Ordinarily the presumption would be that one who makes a conveyance is of full age and competent to convey, and the burden of proving non-age would be upon this defendant; but in this case the burden is shifted by the peculiar condition under which the common grantor, Friday M. Neahr, held her title, and also by the pleadings of the plaintiff.

Friday Neahr was given this land by her father David in 1882, upon condition that she should not dispose of the same until she was 21 years of age. (Trans., fol. 32, deed David Neahr to Friday M. Neahr.) The plaintiff also by his pleadings has assumed and placed upon himself the burden of proving Friday Neahr's majority on the 14th day of October, 1892, alleging in his complaint that such is the fact. (Trans., fol. 5.)

1 Greenleaf Evidence, 14 Ed., p. 104, sec. 74.

He assumed this burden all through the trial, as will appear from the testimony of his witnesses introduced on the opening of the

trial. Had he relied upon the ordinary presumption of full age, his course would manifestly have been to introduce his deed and rest upon it until the defendant had introduced his evidence as to minority.

That he failed to sustain this burden the evidence conclusively shows.

The testimony offered by the plaintiff was first that of the witness E. Weiger, who it appears lived in Yuma from 1866 or 1867 to 1873, and in 1871 lived, as he says, in a house adjoining the Neahr's. (Trans., fol. 12.) He testifies that in 1871 there was a female child born to David Neahr, whose name he "believes" was Mary. (Trans., fol. 12.) This witness seems to have been anything but an intimate acquaintance with the Neahr family. He was employed as a clerk by an opposition merchant, and the only time this child or its mother ever was in his house was, as he testifies, one noon soon after the child was born. He left the house next to the Neahr's in the fall of 1871, and left Yuma in 1873, and had never seen the child since, and up to date of the trial, a period of more than 20 years, had resided continuously in California. This witness is able to fix the year of Friday's birth in 1871 only by the fact that some time in that year, or in the year the child he thinks is this one, was born, he copied a paper which he still retains, and which bears upon it the date 1871, without day or month, and which paper he now uses to refresh his recollection as to the year.

The plaintiff's next witness is William or Freeson Neahr, a brother of Friday, who testifies that he is 37 years of age in 1895, and that he "always understood his father to say that Friday was was born in 1871." (Trans., fol. 16.) It will be observed that although this witness is a brother of Friday, and according to plaintiff's theory 13 years older than his sister, plaintiff's counsel failed to examine him as to his own opinion as to his sister's age; and upon cross-examination this witness, 13 years old when his sister was born, has no recollection of the year in which she was born; and this remarkable witness in fact does not know how old he himself is, as develops on his further cross-examination.

The only other witness who testifies on the part of the plaintiff, is one Samuel Purdy, who testifies that when he came to Yuma in 1874, Friday "was running around," and he judged her to be 3 or 4 years old. (Trans., fol. 20.) He fails to state what time of the year he arrived at Yuma, and when he first saw the girl, though he recollects there were other Neahr children about there at the time, and it is very easy for him to be mistaken as to this particular child, he having no intimate relations with the family and no reason to charge his mind with the facts as they existed 20 years before this trial.

This is all the testimony offered by the plaintiff to sustain his contention that Friday Neahr was born in 1871, except the remark-

able deed which the plaintiff received from Friday Neahr in 1892. We say remarkable, because it shows that the plaintiff himself at the time he took it must have had considerable doubt as to the grantor's capacity to make it; otherwise why have the grantor in her acknowledgment affirm that she is 21 years of age, and her brother, Freeson (otherwise William) and Samuel Purdy, the plaintiff's witnesses, annex to it their affidavits; the one that to the best of his *knowledge* and *belief* Friday was 21 years of age September 25, 1892, and the other that when he came to Yuma in 1874, Friday was, to the best of his judgment, three to four years of age?

We say this is all the plaintiff's evidence as to the age of Friday Neahr—there is, however, a certified copy of the record of an affidavit made by another brother, Freedom Neahr, in another proceeding (Trans., fol. 63), which the plaintiff offered and which was objected to as incompetent, wherein this brother testifies as to Friday's age in 1884; but this copy of the record of an affidavit seems so plainly incompetent that its reception in evidence was palpable error, and enough to reverse the case.

Now, in opposition to this sort of evidence, the defendant Marshall offered the testimony of intimate acquaintances of the Neahr family, those who had grown up with the children of that family, women who had children born within a month or two of the time this girl was born—children who were baptized by the parish priest of the Roman Catholic church at Yuma, soon after birth, and of whose baptism and birth a church record was made. The church records were offered and received to corroborate the testimony of these witnesses, and do corroborate them. Almost every witness sworn by the defendant as to his or her recollection of the year of the birth of Friday Neahr, was able to call up some fact of public notoriety or produce some documentary evidence of highest and unquestioned veracity, to tie his testimony to, and their testimony completes such a perfect chain that after a review of it we believe this court must conclude that there remains no doubt that Friday Neahr was born in 1873, and if so the deed to Burtis was executed while she was an infant.

Mrs. Trinidad Muzzy, a resident of Yuma for 25 years, and who knew the Neahr family well, testifies that on the 26th of December, 1872, she purchased a lot in Yuma and built upon it a restaurant which she opened for business on February 22, 1873; that the Neahr family were customers at her restaurant until some time in July of that year, when Mrs. Neahr, owing to her condition was not able to come longer (Trans., fol. 23), and that in September this child Friday was born. (Trans., fol. 23.) This witness also says that in September of that year David Neahr celebrated the birth of his daughter Mary "by treating the boys there until late in the evening," and in a few weeks Mrs. Neahr came to the restaurant with the child in her arms, and, as the witness says, "they have

called her little Mary ever since." That there may be no mistake as to this date, the witness produced in court her deed of the restaurant lot, which is dated December 26, 1872, and is to be found at folio 24 of the transcri pt; and she says she knows the year in which these things took place was that in which she opened her restaurant.

Mrs. Eliza Weber, who had resided in Yuma for 31 years—ever since her birth—testified that she lived near the Neahr's at the time Friday was born; that her brother James (Jones) was born in the same year, and that she carried her brother over to the Neahr's to see Friday very soon after she was born. (Trans., fols. 26–27.) This brother the witness testifies was baptized in the Catholic church at Yuma not later than a month after his birth, under the name of Santiago Jones (the Spanish for James) (Trans., fol. 27), and when we come to the testimony of Father Gheldof, the parish priest, we find that the records of the church at Yuma show that on the 30th day of July, 1873, there was publicly baptized James, the son of Eliria Armenta, born the 15th day of July, 1873. And it appears also from Mrs. Weber's testimony that her mother's name, the mother of this boy James, was Eliria Armenta. (Trans., fol. 26.) This witness was a playmate of the Neahr children, and, as she says, was with them nearly every day. There was another event that occurred in Yuma that year which strongly impressed itself on the minds of all who were living there at the time and old enough to appreciate it, and that was the judicial execution of a Mexican for murder. This execution took place on the 2d day of May, 1873, as appears from the court records of said Yuma county, and this witness, Mrs. Weber, remembers it and states that the child Friday was born after that hanging. (Trans., fol. 27.)

Mrs. Downey, who has also already resided in Yuma since 1864, recalls the year of the birth of Friday Neahr, whom she has known ever since she was born, by the fact that a son was born to her in the same year, viz: on June 13, 1873. (Trans., fol. 32.) This son was was also baptized in the Catholic church and public record of his birth in evidence shows that he was born on the date fixed by this witness in 1873. (Trans., fols. 32, 33.)

We emphasize these two events as they were facts which, as a basis for statement, were absolutely impregnable.

The mother of this witness worked for Mrs. Neahr at the time Friday Neahr was born (Trans., fol. 34), and the circumstances of Friday's birth and being of about the same age as her child, are impressed on the witnesses' minds by this and by the fact that Friday's mother took her (the witness') babe and nursed it at her own breast. This witness also recalls the hanging of the Mexican and fixes it before the birth of her child or of Friday Neahr. This witness also contradicts the plaintiff's witness Weiger, as to his place of residence when Friday Neahr was born and shows that Mr.

Weiger is mistaken as to his recollection of his place of residence at that time.

Mrs. Rosa Silva, mother of the witness Mrs. Downey, corroborates her daughter's testimony as to the date of the birth of Friday Neahr, fixing it in 1873. (Trans., fol. 34.) She, it seems, was a midwife and "assisted," as she says, at the birth of a number of other children born the same summer that Friday Neahr was; one of these was her grandson, the son of Mrs. Downey, another the brother of Mrs. Weber, both of whose baptismal records are in evidence herein, showing them to have been born in 1873. She recalls the fact that she went from her daughter's, after her son was born, to Mrs. Neahr's, and remained with her until a few days before Friday was born, and four days after her birth saw the child, who she says was called Mary, and whom she has known ever since. (Trans., fol. 35.)

Here, then, are three witnesses who cannot well be mistaken as to the date of this child's birth—all intimate acquaintances of the family, and knowing the child from her birth, their testimony fixing the date of birth of Friday Neahr by the birth of children in their own families who have grown up with Friday Neahr, and as to whose ages they cannot well be mistaken, even though there was not the unchallenged public record of the church showing their ages.

Some objection was made to the introduction of the church record in evidence, and here is perhaps the proper place to dispose of that objection. It was shown by the testimony of Miss Mary Post, who resided in Yuma in 1873, that Father Chaucot was the priest in charge of the Catholic church at Yuma that year (Trans., fol. 29); the record offered is signed by Father Chaucot, and was kept in his handwriting in the Spanish language (Trans., fol. 36). That it is in his handwriting is shown by the testimony of Father Gheldof, the priest in whose possession the record is (Trans., fol 36), and who succeeded Father Chaucot. The book containing this record was offered for the inspection of the court below, and was sworn by its custodian to be the record of baptisms kept by the church at Yuma according to the custom of the Roman Catholic Church (Trans., fol. 36).

That records of this character, thus authenticated, are competent to prove the facts stated in them has been held by the best of authority in this country.

Kennedy *vs.* Doyle, 10 Allen, 161.
Witcher *vs.* McLaughlin, 115 Mass., 167.
Cited, 1 Gr. Ev. (14 ed.), 160, note (*a*).

But this is not all the evidence that the defendant offered as to the year of the birth of this girl.

Two ladies, sisters, who have lived in Yuma most of the time since childhood and have known Friday Neahr since seeing her first as an infant in arms—Mrs. Caroline McIntyre and Mrs. Nailor—testify positively as to her having been an infant less than a year old and still carried in a nurse's arms in the spring of 1874. These two witnesses were then young girls going to a school kept by Mr. and Mrs. Nash (Trans., fols. 36, 37), and this school was in the next house to the Neahr's, only a fence between. This year, 1873–74, was the only year that the Nash's taught school in Yuma, commencing in October, 1873, and closing in the summer of 1874, they filling the interim of teaching of Miss Post.

Miss Post came to Yuma in April, 1872, and was acquainted with David Neahr and his family, but has no distinct recollection of Mary (or Friday) until she came to school to her in the spring of 1878 (Trans., fol. 38), when Friday was, according to Miss Post's understanding, under school age. She cried a good deal and had to be sent home in charge of one of her brothers (Trans., fol. 38), and by the school age at that time Miss Post means six years.

Miss Post's testimony is well worth careful consideration; it is given by a lady who for 25 years has been a teacher in the public schools of Yuma, and from it this Court must see that she is a lady of good judgment, education and more than average intelligence. Her testimony also fills a very important place in this case, for it serves to bind together and corroborate, as to the date herein in question, the testimony of several other witnesses. For example: Miss Post knew Father Chaucot, the parish priest, whose records are here introduced, to have been such priest when those records were made. She taught the school at Yuma during the school term of 1873, leaving Yuma in July, 1873, to take to San Francisco and place in an orphan asylum the sisters of the twins who Mrs. Rosa Silva testifies were born at Antelope in the spring of 1873. The mother of the twins died, and Miss Post, as stated, took their sisters to San Francisco in July, 1873, and returned the next year, and during her absence Mr. and Mrs. Nash taught the school which Mrs. Nailor and her sister, Mrs. McIntyre, attended, just as these women testified, as we have before stated. Miss Post's testimony is, therefore, most important in the way of corroboration, as well as in her estimate of Friday's age when she first came to school to her.

Other witnesses gave important testimony bearing upon this question, among them O. F. Townsend of Yuma—Wells-Fargo's agent there—who testified that he had known the girl since 1874, and was very intimate with her father. (Trans., fol. 41.) This witness was in David Neahr's store when the doctor who attended Mrs. Neahr at the birth of this child came down to inform the father of the event, and recollects the father's remark, "We will have to open some wine; it's another girl." Mr. Townsend recalls the date from its being *in the same year the Mexican was executed at Yuma*, and

also from his recollection of the physician, Dr. Mix, having left Yuma the same fall or winter. (Trans., fol. 41.)

The execution of the Mexican was in May, 1873. (Trans., fol. 43.)

Mrs. Balsz, now living in Phœnix, was a resident of Yuma from 1862 to 1880. She lived not far from the Neahr family, and in 1876 married and moved to the same block with them. (Trans., fol. 57.) When she moved into that block Mary (or Friday) Neahr came to her house nearly every day, and seemed to her to be about three years old. Mary's mother also told this witness that Mary was then (1876) three years old; that her children came every two years, and then she had a little boy just learning to walk. Mrs. Balsz cannot well be mistaken as to this date, for it was the year of her marriage.

This is all the testimony from those who have known this girl ever since her birth; but in corroboration of it all comes the witness, J. W. Walker, who testifies that the plaintiff, Burtis, himself stated to him only a few days before he took his deed in 1892, that "Mary Neahr was not of age" (Trans., fol. 60); and the plaintiff has not denied the making of this statement, so it stands uncontroverted, that the plaintiff himself knew his grantor was an infant.

Under this testimony, does it seem possible to come to any other conclusion than that Friday Mary Neahr was born in the year 1873, and not in 1871, as contended by the plaintiff? Friday Neahr herself was sworn as a witness on the part of the plaintiff, Burtis, but was not interrogated as to her age by either party. Her brothers, William and James, were also witnesses, but neither can state positively his own age, much less could they that of their sister; and the only other witnesses who testify to her having been born prior to 1873, are Mr. Weiger, who, as stated, removed from Yuma more than 20 years ago, and had not seen her during all that time—and Samuel Purdy, who saw Yuma first in 1873, and believes she was then three years old, though it is difficult to understand why Samuel should have charged his mind during all these years with this one child's age and appearance 21 years before the trial of this cause. Records and documents, public events, marriages or the birth of relatives enable every witness sworn for the defendant to fix the year in which this child was born; these documents and the church record are produced in court, and not a suspicion rests upon any of them, nor is there anywhere a suspicion cast upon a single witness as to his veracity and sincerity. That women are more apt to fix dates of birth correctly than men is a matter of common observation, and it is no more likely that all these women who have testified for the defendant herein as to Mary Neahr's birth in 1873 are mistaken by two years than that they are mistaken as to their own marriages and the dates of birth of their own children or close relatives. And lastly, and as important as anything else in the case in the way of testimony, is the

undisputed declaration of the plaintiff himself made to the witness Walker that he knew the girl was not of age when he took his deed from her in 1892. The plaintiff's deed, with all of its unusual and unheard of declarations of full age attached, is also important as showing the plaintiff's suspicion that the girl might be under age, or at least her majority was so doubtful that it was necessary to have it sworn to.

2. Did Friday Neahr fail to disaffirm her deed to the plaintiff within a reasonable time after reaching majority?

If our contention be established that she came of age September 25, 1894, it will hardly be contended that a disaffirmance of her acts as an infant made within the following month is unreasonable delay. There is no proof that she was guilty of any laches; she resided a long distance from the land in question, and there is no proof that she ever saw it, much less that any improvements were put upon it to her knowledge, which courts have held to be a circumstance to be shown in bar of an infant's right to disaffirm.

3. Did Friday Neahr ratify her deed to the plaintiff before she deeded to the defendant?

It will be contended here by plaintiff's counsel, as in the court below, that at the time Friday Neahr made this deed to the defendant, Marshall, she told him she had before that time sold the land to Burtis, and this they say is an affirmance.

The only statement of this sort anywhere in the evidence is to be found in the testimony of Friday Neahr, where she says, "I told him I didn't want to go back on it (the deed to Burtis); that I didn't want to get into any scrapes, and that I thought I had the age to sell—that it was sold well." (Trans., fol. 48.)

Page 53 she says, "I mean by the term 'well sold,' that I had the age to sell." This statement, if it ever was made to the defendant, and the defendant denies it being made, further than that she told him she "didn't want to do anything unlawful" (Trans., fol. 64), counts for nothing in our view of the law.

It will appear from the testemony of both Mary Neahr and the defendant that this language, if used at all, was used in a conversation which resulted in the making of a deed to the defendant (Trans., fol. 58), and it can hardly be claimed that taking one sentence out of a conversation of which a resultant act is a solemnly executed conveyance, will be allowed to operate as an affirmance or dissaffirmance of the conveyance itself. It appears that Mary Neahr sought and received counsel from a lawyer in whom she had confidence before she executed this deed of disaffirmance. (Trans., fol. 50.) Mr. Davis was called in at her request, and he advised her that if she was under age when she signed the deed to Burtis, she could affirm it, revoke it and keep the land herself, or could sell it to Mr. Mar-

shall. (Trans., fol. 56.) She chose to sell to Mr. Marshall and to revoke her former deed made, as she states in the Marshall deed, during her minority—this is the affirmance of Burtis' deed, as claimed by plaintiff.

But what is held by the courts to constitute a ratification of an infant's deed, and what not? Some of the things which courts have held to amount to a ratification are: The giving of another deed to the original purchaser, taking a lease of the land, receiving payment of a part of the purchase money then unpaid, standing by and seeing valuable improvements made on the premises, allowing the purchaser to occupy for so long a time that her assent is to be presumed. Any one of these things, if done or suffered after the minor came of age, we concede would bar her right to revoke the deed made in infancy.

In this case nothing more is claimed than that she notified the second purchaser that she had formerly conveyed the land to another; but upon his stating that she was not of age when she made the first deed, and after being advised by her own attorney as to her rights, she made the second deed.

That an infant did after majority voluntarily and deliberately recognize the deed made during infancy as an actual conveyance of his right, is not a bar to his revocation or disaffirmance of the former deed, is held to be good law by as high authority as the Supreme Court of the United States.

Tucker *vs.* Moreland, 10 Peters, 69, 74, 75.

The mere recognition of a fact that a conveyance has been made is not *per se* proof of the confirmation of it.

Id. (75).

Also, page 76: "The act of affirmance must be of that solemn, unequivocal character as to establish a clear intention to confirm the deed after a full knowledge that it was voidable."

So, also, if the second purchaser is aware of the first conveyance, it is no bar to his taking title; neither is it a fraud to make, or the second purchaser to take, the last conveyance. If the second purchaser is aware of the first conveyance, and of the circumstances under which it was executed, he then knew that Mary was not bound by it, and was competent to revoke it and give another deed.

Jackson *vs.* Burchin, 14 John, 124.

Tucker *vs* Moreland, 10 Peters, 69.

In the Jackson case (N. Y.), the infant grantor was produced as a witness on the part of the defendant. His testimony that before executing the second deed, after he came of age, he had refused to sell because he had already made a deed in infancy, was held improper.

If the rule were that a minor could disaffirm only by sale to one who had no knowledge of the previous conveyance, then there could be no disaffirmance in a state wherein the registry laws are in force.

In this case has not the minor within due time after attaining majority taken the proper legal course to disaffirm? It is universally held that the second deed, executed after attaining majority, is a disaffirmance of the one executed in infancy, if executed in time. Mary Neahr arrived at full age in the latter part of September, 1894. October 4, 1894, she made this deed to Marshall; and in it the Court will observe she expressly revokes the former deed to Burtis, and warrants the title. If the rule as laid down by the Supreme Court of the United States is to be observed, the only method by which minor's deed can be affirmed is by making another affirming, or by some act "of such solemn and unequivocal nature as to establish a clear intention to confirm the deed after a full knowledge that it was voidable." Here the only act of the infant after she comes of age is her express and positive disaffirmance and revocation by a deed executed with all the solemnity of the one executed in infancy; and can it be said that because this person had said in the same conversation that she had sold the land before, that she thereby, and by so trivial a proceeding, so bound herself that she could not disaffirm by her deed? As the court said in Tucker *vs.* Moreland (76), there must be some distinct act by which the infant "receives a benefit from the contract after he arrives at age, or does some act of express ratification."

See Irvine *vs.* Irvine, 9 Wal., 617.

Can this Court say that it will take part of a conversation, out of its connection, and give effect to it, when the conversation taken as a whole results in a specific written deed, duly executed and acknowledged, which would be avoided and set at naught were the prior portion only of the conversation taken?

We respectfully submit that no act of Mary Neahr's has been proven which would amount to a ratification of her deed to Burtis, while, on the other hand, express disaffirmance of such a deed has been offered in evidence.

4. Possibly the question of the estoppel of Mary Neahr to deny her first conveyance may be claimed by plaintiff's counsel, on the ground that she represented herself to be of age when she made the first deed. This we think the plaintiff can hardly claim, in view of the undisputed testimony of J. W. Walker, who swears that Burtis told him before his deed was made that Mary Neahr was not of age; also by the extraordinary affidavits attached to his deed, whereby he seeks to bolster up an instrument which he had every reason to suspect was voidable, and being made by an infant.

The doctrine of estoppel does not apply to the acts of infants.
Lackman *vs.* Wood, 25 Cal., 1 & 7.

A grantor is not estopped from disaffirming her deed on the ground of infancy by a false recital in the deed that she was unmarried and of age.
Simms *vs.* Everhard, 102 U. S., 300.
Weiland *vs.* Kobick, 110 Ills., 16.
S. C. 51 Am. Rep., 676.

In equity the same doctrine applies:
Baker *vs.* Stone, 136 Mass., 405.

A conveyance by an infant is an assertion of the right to convey; a contemporaneous declaration of his age adds nothing to that implied by his deed. An assertion of estoppel against him is but a claim that he has asserted or contracted; but he can no more do that effectively than he can make the contract alleged to be confirmed.
Simms *vs.* Everhard, 102 U. S. (313).

This case is similar to ours in this, that the infant signed a statement that she was of full age, when she made the deed.
Id., p. 301.

Where the purchaser is cognizant of the facts, he cannot claim an estoppel on the ground of fraud, because he has taken the chances of his title.
Davidson *vs.* Young, 38 Ills., 152.

It is useless to pile up further authorities; there are some few, undoubtedly, against the position assumed by us herein, but they can have no effect upon the judgment of a Territorial court, bound, as it is, by the decisions of the United States Supreme Court, which has made a positive declaration that an estoppel *in pais* is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity.
Simms *vs.* Everhard, 102 U. S. (313).

5. Was it necessary for Friday Neahr to restore the consideration received by her in infancy for the deed to Burtis before disaffirming and conveying to another?

The testimony of Mary Neahr shows that she did not have any part of the consideration paid by Burtis when she became 21 years of age in September, 1894. She herself says she spent it all within a very short time after she received it in October, 1892. (Trans., fol. 49.) Under these circumstances, then, does the law require of her the restoration of the consideration received and squandered in infancy? If it does, then as was said in Harvey *vs.* Briggs, 8 So. Rep., 274 (276), "Such a rule practically strikes down the shield

which the law, by reason of his inexperience and youth, throws around the infant." "If he has lost or squandered the consideration during minority, this is nothing more than the law expects of him, and he cannot be required to purchase the right of reclaiming his own by still further abstractions from his estate."

Brantly *vs.* Wolf, 60 Miss., 420,
quoted in Harvey *vs.* Briggs, 8 So. Rep. (276).

This case is especially called to the attention of the Court, as it expressly overrules the dictum in the earlier Mississippi cases of Hill *vs.* Anderson, 5 Smedes & M., 216, and Ferguson *vs.* Bobo, 54 Miss., 121, quoted by some text-writers, and by counsel for plaintiff herein, in support of the broad proposition that in all cases the infant must place his grantee in *statu quo* before rescinding. The very latest text-writer thus lays down the rule: "If the consideration received is still in some tangible form in the hands of the grantor or his heirs who come to disaffirm, it ought to be tendered back, but if it has been wasted or lost it need not be restored or tendered back; for the inability of infants to take care of the proceeds of their lands and the likelihood of their being cheated out of their money is one of the main reasons for the law which disables them from a binding deposition of their lands."

1 Dembitz on Land Titles (1895), p. 423 and note.

It must be borne in mind that the plaintiff herein makes no claim that Mary Neahr retained any portion of this consideration until she reached majority, and her own testimony shows that the plaintiff has taken the proper view of the matter and threatened her with a suit for money paid if he fails to recover in this suit (Trans., fol. 53.)

While it is true that dicta may be found wherein the rule is stated to be that in order to recover his lands or rescind his executed contracts, an infant must restore the consideration received whether he has it after reaching majority or not, we submit that the great weight of authority is the other way, and should in reason be so, so long as infants are protected by the law. We can quote extracts from only a few cases, e. g.:

"The privilege of repudiating a contract is accorded an infant because of the indiscretion incident to his immaturity, and if he were required to restore an equivalent where he has wasted or squandered the property or consideration received the privilege would be of no avail."

Craig *vs.* Van Bebber, 13 S. W., 906, Mo.

In a note to this last-cited case as republished in 18 Am. St. Rep., p. 678, the authorities are gathered and brought down to the date of the decision (1890), upon all questions arising from infancy.

In Massachusetts the courts hold, "If the consideration has passed from his (the infant's) hands, either wasted or expended during his minority, he is not therefore deprived of his right or capacity to avoid his deed any more than he is to avoid his executory contracts."

Chandler *vs.* Simmons, 97 Mass., 508.
S. C. 98, Am. Dec., 117–122.

The Supreme Court of the United States also lays down the same rule in these words:

"If during infancy he has wasted, sold or otherwise ceased to possess the property, these acts cannot be a bar to his recovery."

"To give effect to such disaffirmance it is not necessary that the infant should place the other party in *statu quo*."

Tucker *vs.* Moreland, 10 Peters, 58–74; 1 Am. Leading Cases, 237–319, top.
Mississippi—Harvey *vs.* Briggs, 68 Miss., 60, and 8 S. Rep., 274.
Missouri—Lacy *vs.* Piscler, 25 S. W. Rep., 206.
Pennsylvania—Ruchizky *vs.* De Haven, 97 Pa., 202.
Virginia—Mustard *vs.* Wholford, 76 Am. Dec., 209.
Maine—Boody *vs.* McKenny, 23 Me., 517.
New York—Green *vs.* Green, 69 N. Y., 553.
Minnesota—Dawson *vs.* Holms, 30 Minn., 107; 14 N. W. Rep., 462.
Kentucky—Vallandingham *vs.* Johnson, 85 Ky., 288; 3 S. W. Rep., 173.
Arkansas—Stull *vs.* Harris, 51 Ark., 249; 11 S. W. Rep., 104.
Illinois—Reynolds *vs.* McCurvy, 100 Ills., 356.
Nebraska—Englebert *vs.* Troscell, 58 N. W. Rep., 852.
Indiana—Carpenter *vs.* Carpenter, 45 Ind., 142.
Ohio—Cresinger *vs.* Welch, 15 Ohio, 156–195.
Alabama—Manning *vs.* Johnson, 26 Al., 446; 62 Am. Dec., 732.
Vermont—Price *vs.* Furman, 27 Ver., 268: 65 Am. Dec., 194.
Massachusetts—Chandler *vs.* Simmons, 97 Mass., 508.
Nebraska—Bloomer *vs.* Nolan, 53 N. W., 1039.
Schouler Dom. Rel., Sec. 446 and Note 2, p. 633, and Note 8, p. 635.

Even in those States where by statute the infant is required to restore the consideration received before revoking his conveyance made to a purchaser in good faith believing him to be of age, it is distinctly and positively held that if the purchaser deal with the infant, knowing him to be an infant, he is bound to know that the infant might at any time rescind without restoring what had been received.

Shaul *vs.* Rinker (Ind.), 38 N. E., 593 (594).
Simms *vs.* Everhard, 102 U. S. (311), Indiana case.

And where he has squandered the proceeds in infancy, he may nevertheless disaffim and recover back the property.

Leacox *vs.* Griffith, 40 N. W., 109, Iowa.
Jenkins *vs.* Jenkins, 12 Ia., 195.

6. It will probably be urged by the plaintiff that the defendant was not in position to take title to this property by his deed of Oct. 20, 1894, because he knew of the prior deed.

We admit that he knew of the prior deed—so did everyone else. The world at large was bound to take notice of it, for it had been duly recorded in the office of the County Recorder of Maricopa County. If this doctrine is to apply, a minor can never revoke a sale made during infancy; he cannot sell to anyone, for everyone is bound by the knowledge the public record presumes him to have of the prior conveyance.

The authorities upon this point have been cited in this brief under the head of ratification (ante P.), and it is not necessary to repeat them here.

But the appellee may claim that some fraud was perpetrated upon the girl Friday Neahr, whereby she was induced by false and fraudulent pretenses to sign a deed to the defendant without consideration, and the contents of which were unknown to her.

The testimony of all the parties present at the making of this deed is before the court—not a syllable is to be found anywhere showing that she was not fully aware of its contents; in fact, her own testimony shows that she advised with her own attorney before she signed it (Trans., fol. 50), and after that sent out for a notary to take her acknowledgment. Her attorney, Davis, did advise her (Trans., fol. 57). Neither does Friday Neahr make any complaint that there was any fraud perpetrated upon her when she signed the deed to Marshall. It is true Mr. Marshall only paid her $100, and agreed to pay $200 more when he should obtain possession of the land. She accepted this consideration knowing that the conveyance meant this litigation, which must be met and carried on at a large expense, which she was probably unable to bear; and we do not find that she ever made any complaint until the plaintiff's attorney, Mr. Knight, went to her after this suit was commenced and threatened her with suit to recover the money paid to her by Burtis and squandered during her infancy; then we find that, under such pressure, on October 7, 1895, a year after the deed was made, she signed the document in evidence at folio 51. Not until then, and under that pressure, did Friday Neahr, discover that she had been induced to convey to Marshall by a misrepresentation. In this document, which she says she did not write, but which she signed because Mr. Knight told her to (Trans., fol. 51), she says she tenders back to Mr. Marshall the $100 and his note paid by him for the land; but it appears that she herself had nothing to do with the tender; that it was the plaintiff

in this case who made the tender, and who furnished the money to make it with (Trans., fols. 51, 52). So it appears that it is this plaintiff who is dissatisfied with the deed to Marshall, and who is endeavoring to revoke the deed made by Friday Neahr, after attaining full age. He is hardly in position to claim to act for Friday Neahr, or to take advantage for himself to her right to claim a fraud in this action. Friday Neahr is not a party to this action, and is not asking any relief herein.

The only testimony offered by the plaintiff upon which he can even claim to base any allegation of wrong-doing by the defendant in obtaining this second deed, is that of Friday Neahr wherein she states that she told Mr. Marshall she didn't want to go back on her previous sale; that she didn't want to get into any scrapes, and thought she had the age to sell; but on his telling her he had good proof that she was not of age, and after being advised by her attorney as to her rights, she did make the deed. The brother Freeson (or William) Neahr was present at a part of this transaction, and adds to the testimony of Friday that Mr. Marshall said he "wanted to get even with those parties; that they was playing him a dirty trick, and he had evidence she was not of age, and in that way he would get even with the parties." This witness explains on his cross-examination what he means by the dirty trick he says Mr. Marshall spoke of, though it will be found that Mr. Marshall in his testimony denies having used any such language; and it is well, perhaps, for the Court to know just what was meant by this, though we do not regard it as material to this case whether Marshall took the deed "to get even" or not, so long as he has it and paid for it, and is claiming under it. His motives in buying this land are hardly a fit subject of inquiry in this action. If the Court cares to look into the original means by which the plaintiff Burtis obtained this land from this girl, it will be found succinctly stated in the testimony of Mr. J. W. Walker, commencing at folio 60 of the transcript. There it appears that in 1892 Mr. Marshall had arranged to purchase this land from Friday Neahr for $1,400; the deed to him was in the bank for delivery, but he did not have quite enough money to pay for it; he sends Mr. Walker to Burtis to borrow it, and tells him what he wants it for. Burtis promises to let him have the money, although he says Friday was not of age (Trans., fol. 60), but put him off for a week, until he could send his (Burtis') agent to Yuma and buy it for himself, which he did for $100 more than Mr. Marshall was to pay. Burtis then took advantage of the knowledge he obtained from Walker as to Marshall's intended purchase, and by the "dirty trick," as William Neahr says, got it for himself. Marshall procures his proofs as to Friday's minority and waits until she is of full age, and then obtains the property by purchase.

These are all the facts, and upon them all it seems to us the Court

must find: 1, That Friday Neahr was an infant when she made the deed to Burtis in 1892; 2, That she never ratified or confirmed it; 3, That she spent the consideration received from Burtis during infancy, and was under no obligation to return it as a condition of revoking her deed; 4, That she did revoke her first deed within reasonable time after coming of age; and, 5, That the title to this land is now in the defendant Marshall.

We therefore ask the Court to reverse the judgment of the court below and remand the case.

All of which is respectfully submitted.

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